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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

JOHN WILBANKS,

Petitioner

VS.

THE STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

ARGUMENT

I.

Petitioner urges this Court to extend the rule pronounced in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 148, 6 L. Ed. 1081 (1961), to include retrials commenced after *Mapp*.

Petitioner questions the observation made by the Alabama Supreme Court in *State v. Wilbanks*, 266 So. 2nd 619 (1969), wherein that Court stated that it could not conceive of any reason why the rule pronounced in *Jenkins v. Delaware*, 395 U.S. 213, 389 S. Ct. 677, 23 L. Ed. 2d, 253 (1969), should not apply to post-*Mapp* retrials. In *Jenkins*, this Court held that the rule in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), did not

apply to retrials conducted after the decision date of *Miranda.* Petitioner argues that the Alabama Supreme Court is incorrect in applying *Jenkins v. Delaware,* supra, to post-*Mapp* retrials by saying that *Mapp* did not set down a newly articulated Constitutional principle, but simply extended the exclusionary rule pronounced by this Court in *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), to include State Courts. We cannot accept petitioner's argument that *Mapp* does not enunciate a new rule of law. Certainly *Mapp* greatly changed criminal procedure as it concerns the admissibility of evidence obtained as a result of a search. In fact, this Court, in *Linkletter v. Walker,* 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d, 609 (1965), observed that the effect of *Mapp* was certainly to change the existing law with regard to the enforcement of rights.

The initial conviction of petitioner was reversed by the Alabama Appellate Courts prior to *Mapp.* The retrial, although after *Mapp,* should be considered as a continuation of the initial prosecution and should not be subject to the *Mapp* rule. *Jenkins v. Delaware,* supra. We most respectfully submit that the rule enunciated in *Mapp,* supra, should not be held to apply to retrials commenced after *Mapp,* supra.

II.

Petitioner asserts that the Alabama Supreme Court erred in failing to follow the mandate in *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d, 908 (1964) and *Sims v. Georgia,* 385 U.S. 538, 87 S. Ct. 639, 17 L. Ed. 2d, 593 (1967), and that there should have been a determination made outside the presence of the jury, as to whether statements made by petitioner were free and voluntary. Respondent directs the Court's attention to the opinion of the Court of Appeals of Alabama of June 25, 1968, 266 So. 2d 609, reproduced in the appendix in appellant's brief,

pages A-8 through A-12, which contain the colloquy between counsel, witness, and Court concerning the statements of petitioner. Nowhere during that colloquy does there appear to be any question raised as to voluntariness of the statement made by petitioner to the Sheriff. Objections were made to the relevancy and materiality of the answers given, but not to the issue of voluntariness. Where a confession is challenged as being involuntary, a defendant is entitled to have a determination made as to the voluntariness of that confession. *Lego v. Twomy,* 404 U.S. 472, 92 S. Ct. ..... 30, L. Ed. 2d, 618. Here, there was no challenge to the voluntariness of the confession; there was no question raised as to coercion or threats on the part of the law officers to the petitioner; there was no conflict in the evidence as to the voluntariness of the statements made by the petitioner to the Sheriff. Certainly, a defendant is entitled to have a determination as to whether a statement was voluntarily made by the trial court before it is submitted to the jury. *Jackson v. Denno,* supra. However, we most respectfully submit that where the voluntariness is not at issue, is not questioned, and appears to have been freely and voluntarily given, then the necessity for the trial judge to make a "proper determination" is not present, and the failure to do so should not be in error. *Lego v. Twomy,* supra.

III.

Respondent respectfully submits that the guarantee of the Sixth Amendment to a speedy trial does not and should not apply to appellate procedure in State Courts.

In Alabama, the right to appeal is purely statutory. *Ex Parte State,* 20 Ala. App. 595, 104 So. 2d 346. Title 15, section 365, et. seq., Code of Alabama, 1940.

The Sixth Amendment guarantees, among other things, that an accused charged with a crime shall have "the right

to a speedy and public trial, by an impartial jury". There is no mention made of appeals.

In the case at bar, no complaint is made that petitioner did not receive a speedy trial. Essentially, the only complaint made is that delay in reaching the ultimate decision on appeal can result by having rules of law pronounced by a lower appellate court reviewed by a high appellate court. We trust that petitioner did not intend to infer that delay caused by judicial review constitutes judicial apathy toward the petitioner, especially, in light of the fact that petitioner is, himself, seeking a judicial review by this Honorable Court of the opinions of the Alabama Appellate Courts.

Respondent most respectfully submits that the Sixth Amendment right to a speedy trial does not encompass state appellate procedures.

CONCLUSION

Respondent respectfully submits that the questions presented to the Court on Application for Writ of Certiorari are not such as to warrant issuance of the Writ. It is further submitted by respondent that the judgment and opinion of the Alabama Court of Criminal Appeals, in affirming the conviction, is proper and without error.

THEREFORE, respondent respectfully requests that the Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Walter S. Turner, Chief Assistant Attorney General, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of December, 1972, I served three copies of the foregoing Brief and Argument of Respondent in Opposition to Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama, and by mailing three copies of same in a duly addressed envelope with postage prepaid to the Honorable James M. Fullan, Jr., Attorney for John Wilbanks, 900 Massey Building, Birmingham, Alabama, 35203.

WALTER S. TURNER
Chief Assistant
Attorney General